U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: January 28, 1999
Case No.: 1996-INA-0234

In the Matter of:

DONALDSON, LUFKIN & JENRETTE
SECURITIES CORPORATION,
Employer

On Behalf Of:

GIRIDHAR VEDANTHAM,
Alien

Certifying Officer: Dolores DeHaan, Region II

Appearance: Irving Damast, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties, 20 C.F.R. § 656.27(c).

Statement of the Case

On July 7, 1994, Donaldson, Lufkin & Jenrette Securities Corporation ("Employer") filed an application for labor certification to enable Giridhar Vedantham ("Alien") to fill the position of Financial Systems Analyst (AF 6-7). This application was amended on January 4, 1995 (AF 19-21), and February 14, 1995 (AF 30-31). The job duties for the position are:

> Develop, test & document software support systems & financial applications utilizing financial analytics & knowledge of mortgage-backed, treasury & corporate debt securities. Assemble raw data from various source files & program calculations of COFI, total return, yield, duration, convexity, risk, prepayment, option adjusted spreads, default and delinquency probability.
>
> Consult with managers, traders & operational staff to formulate & clarify program objectives; write program specifications; construct computer-model programs; design computer terminal screen displays; enter program coding and commands into systems; provide reports & manuals for promotion of user efficiency and corrobration [sic] of applications procedures; install, test and monitor programs and re-write, modify, amend or correct, where required; provide project status reports to users and data processing management.

(AF 31).

The requirements for the position are a Bachelor's Degree in Computer Science/Systems Engineering/Electrical Engineering, and one year of experience in the job offered. (AF 31). Other Special Requirements are:

> Must know object-oriented & structured programming methodologies, C, C++, X-Windows / Motif, UNIX, & SUNOPS, RISC, MSDOS, Windows hardware systems.
>
> Requires knowledge of security products such as, passthroughs, CMOs, Tranches, IO/PO strips, PACs, TACs, Zs, Inverse & Super Floaters, Re-REMICS, callable treasury & corporate bonds, etc.

(AF 31).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In a letter dated November 22, 1994 (AF 8-9), the state agency requested Employer to amend or clarify parts of the application. Among the terms for which further explanation was requested were "financial analytics" and "Requires knowledge of security products ... etc." (AF 9). The state agency directed Employer to address, *inter alia*, the following issues: the definition and function of each computer-related requirement; whether it is customary for Employer and/or its industry to require this specific combination of requirements; and, whether it is customary for Employer and/or its industry to require all of these skills in a single person (AF 8).

Employer responded in a letter dated January 4, 1995 (AF 10-15). Employer began its letter by noting that it is not a computer services company, but rather an investment banking and securities brokerage firm (AF 15). The job offered involves development of financial software applications and, thus, Employer feels that familiarity with securities and security products, such as equities, bonds, and treasury securities, is essential (AF 14). Employer provided the definitions requested by the state agency and described the uses and functions of several computer systems and languages, such as UNIX, SUNOPS, RISC, object-oriented programming, C, and C++. (AF 12-14). To demonstrate its need for specific computer skills, Employer listed several programming projects developed "in-house," including the skills used in the development of each and the time that was required (AF 11-12). Employer noted that it does not maintain documentation which describes specific skill requirements for jobs, nor does it offer programming services to others on a contract basis (AF 10). Employer concluded by stating that all persons it had or does employ as Systems Analysts had a combination of the computer skills required for the job offered (AF 10).

The CO issued a Notice of Findings on December 5, 1995 (AF 56-58), proposing to deny certification on the grounds that Employer's requirements are excessive and restrictive, and not justified by business necessity, thereby violating 20 C.F.R. § 656.21(b)(2). After repeating the list of special requirements found on the application, the CO wrote that "Employer's requirements are excessive and restrictive. The information submitted by the employer, in response to [the state agency's] questions concerning the restrictive requirements, is not accepted as adequate to establish business necessity for twenty-two (22) specific skills" (AF 57). The CO argued that the fact that Employer's organization uses the hardware and software skills and the financial instruments required does not establish the necessity of a single employee to possess each of them (AF 57). The CO wrote that "Employer may rebut his finding by: **a.** amending requirements or **b**. documenting how the requirements arise from business necessity" (AF 56-57). The CO specified that Employer should:

> 1. Document that it is normal for employer to require this specific combination of twenty-two (2) [sic] skills; submit excerpt [sic] from personnel manual, copies of contracts or other documents.
>
> 2. Document, by submitting copies of resumes or employment application, that the prior and present employees who are systmes [sic] analysts had all of the [required skills] prior to hire (AF 56).

Accordingly, Employer was notified that it had until January 9, 1996, to rebut the findings or cure the defects noted (AF 58).

Employer rebutted the proposed findings in a letter dated January 4, 1996, and received January 10, 1996 (AF 60-70). Employer argued that its job requirements are specified in the Dictionary of Occupational Titles (DOT) as part of the duties for the job offered and that the requirements arise out of business necessity. (AF 64-65). Regarding the DOT description of the job offered, Employer noted that knowledge of computer skills and concepts is an integral part of the job. (AF 65). According to Employer, current and previous systems analyst "all have or had a combination of the computer-related skills described [in the application]." (AF 64). Employer further noted that it is implicit in the DOT description that knowledge of an employer's business is a permissible requirement. (AF 64-65). Employer thus concluded that its "job description including the special requirement, are those normally required for the performance of the job duties, as specified or implied in the DOT" (AF 64).

Employer also argued that the requirements arise out of business necessity (AF 62-62). Employer is an investment banking and securities brokerage firm. (AF 64). The job offered will "create, develop and refine financial software applications and programs for [Employer's] own 'in-house use'" (AF 64). Employer recounted its communications with the state agency describing various programs it had developed and detailing the hardware and software used (AF 64). Employer noted that, unlike the computer concepts required, the financial products listed on the application were illustrative, not mandatory (AF 63). Employer also noted that several other "immigration advertisements" found in the New York Times contained similarly lengthy lists of requirements, which Employer took as an indication that its own requirements were not excessive or restrictive (AF 62-63).

Employer finished by claiming that it could not comply with the CO's direction to submit, in the form of excerpts from personnel manuals or copies of contracts, documentation of the need for the challenged requirements (AF 62). Employer stated that it does not maintain personnel manuals containing job descriptions (AF 62). Employer also stated that it does not provide computer services to other companies and, thus, no relevant contracts exist (AF 62). Finally, Employer stated that it conducts its recruiting in an unorthodox manner, that not all of its employees submit resumes, and that its employment application is frequently completed in such a manner that it does not contain the information sought by the CO (AF 62). Modifying and strengthening a claim made earlier in its rebuttal, Employer then stated "that all of the two former and six present [systems] Analysts ... had knowledge of all the hardware/software skills enumerated in [the application]" (AF 62). Citing to the case law, Employer argued that because the information requested by the CO is unavailable, its written assertions should be considered as documentation and given the weight they rationally deserve (AF 62). Based on the foregoing, Employer requested approval of its application (AF 61).

The CO issued the Final Determination on January 25, 1996 (AF 71-74), denying certification on the ground that Employer failed to document that the job requirements for the job offered were those normally required for the performance of the job, thereby violating 20 C.F.R. § 656.21(b)(2). The CO noted that Employer's rebuttal retained all challenged requirements (AF 72). The CO also noted that while it agreed "that a certain number of specific hardware and software skills are normal to these positions, however a list of twenty-two skills, [which] employer failed to document as normal or essential in the industry or with the employer, can be used to disqualify US [sic] applicants." (AF 72). The CO further noted that although it accepts

Employer's assertion that it uses all the skills required in the application, it is not clear that Employer has required every person hired to possess each of those skills. (AF 72). The CO took note of Employer's claim that the independent documentation requested in the Notice of Findings does not exist, but stated that the non-existence of such documentation "does not mandate that [the CO] accept employer's undocumented assertions as valid proof of business necessity." (AF 71). The CO recognized "that it may have been employer's intent to list twelve (12) specific product [sic], as special requirements, as illustrative, however, [the CO suggested] that a list of two or three would be illustrative, and a list of twelve would appear to have a chilling effect on U.S. applicants" (AF 71). The CO also acknowledged the photocopies of other ads submitted by Employer, but indicated that they were not relevant because the CO has "no way of knowing the facts of [those] applications" nor does the CO know whether the requirements listed in those ads were successfully documented as business necessities (AF 71). The CO concluded that "Employer failed to document that [its] requirements for the job opportunity are those normally required for the performance of the job, as [the CO] directed. The case is denied" (AF 71).

On February 23, 1996 Employer requested review of the Denial of Labor Certification (AF 84-86). On March 14, 1996, the CO forwarded the record to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On May 3, 1996, Employer submitted the Employer's Brief.

Discussion

The CO denied Employer's labor certification application in the case *sub judice* on the ground that Employer failed to document certain requirements as either normal for the performance of the job or arising from business necessity. We agree.

As a preliminary matter, we take note of the CO's continued misreading of Employer's application. Employer's use of the term "such as" in both the application and the classified ads is sufficiently clear to indicate that the financial products listed are illustrative and not mandatory. Further, in both its letter to the state agency and its rebuttal, Employer clearly explained the nature of that list. Despite these explanations, and for no discernable reason, the CO treated the list of financial products on the application as mandatory. Only at the end of the Final Determination does the CO appear to recognize the true nature of the financial requirements. The CO's denial of labor certification is, however, affirmable on other grounds thereby making the continued misinterpretation of the application harmless error on the part of the CO. Similarly, the CO's claim that the list, even if illustrative, might have a chilling effect on U.S. applicants was not raised in the Notice of Findings and is, therefore, improper. However, this error is also harmless because the CO's denial is affirmable on other, independent grounds.

An employer seeking alien labor certification must document that the job opportunity's requirements are either those normally required for the job in the United States or arise from business necessity, 20 C.F.R. § 656.21(b)(2). In the present case, Employer argues that the computer skills it requires are both normally required and arise from business necessity. Thus, Employer believes its requirements are not unduly restrictive and that the CO erred in denying its application.

The programmer-analyst entry in the DOT, of which the Board hereby takes administrative notice, begins as follows: "Plans, develops, tests, and documents computer programs applying knowledge of programming techniques and computer systems ...." *Dictionary of Occupational Titles* at 44. The DOT further states that the programmer-analyst "[c]onverts project specifications ... into a sequence of detailed instructions and logical steps for coding into language processable by computer, applying knowledge of computer programming techniques and computer languages." *Id*. The DOT also states that a programmer-analyst "[r]eplaces, deletes, or modifies codes to correct errors." *Id.* A careful reading of the DOT reveals no mention, whether explicit or implicit, to any specific computer hardware or software, nor any specific programming techniques. Had Employer required generic computer skills, its argument that its requirements are defined for the job by the DOT, even implicitly, might have merit. This, however, is not the case. By identifying specific hardware, software, and programming techniques, Employer explicitly requires skills and knowledge more detailed, and therefore more restrictive, than those mentioned in the DOT. Employer therefore failed to demonstrated that the job requirements are those normally required for the job in the United States.

Employer also argues it has demonstrated that its special requirements arise from business necessity. Employer's evidence in this regard consists of its claim, in both the letter to the state agency and its rebuttal, that every person it has hired as a systems-analyst possessed all the skills in question. Under *Gencorp*, 87-INA-659 (Jan. 13, 1988), when the form of evidence is not specified in the regulations and relevant documents requested by the CO are not obtainable through reasonable efforts, written assertions which are reasonably specific and indicate their sources shall be considered documentation. The CO is not required to accept such assertions as credible or true, however, but must give them the weight they rationally deserve. Thus, Employer's statement must be weighed against its implausible claim of lacking any evidence regarding the capabilities and skills of all individuals previously hired as systems analysts.[2]

It is difficult to believe that Employer has hired eight systems analysts and yet has no evidence, other than its own recollection, of the qualifications of those hired. Employer's inability to provide the requested information might be plausible had it claimed that such information existed but was destroyed, or if Employer had provided the information on some, but not all, of the previous hires. Instead, Employer writes that the requested documentation is "inapplicable" to its business, that many of its employees never submit resumes, and that many of the employment applications it receives list only general rather than specific skills. Given Employer demand that its systems analysts possess a detailed list of specific skills, as reflected in Item 15 of the application, its claim to lack any documentation of the skills of the individuals previously hired for this

[2] The Board recognizes that an employer is not necessarily required to produce evidence of this type when hiring new employees, nor even to maintain such records. Hiring an employee who requires alien labor certification, however, is not an ordinary process. An employer making such a hire is requesting to be granted a special privilege. In order to be favored with such special treatment, an employer must comply with the regulations, even it that requires the production of information not normally collected by the employer during its hiring process. For an excellent discussion on the nature of alien labor certification and the special burdens it places on employers, see *Elufa Fashion, Inc*., 95-INA-634 (June 11, 1997).

position is not credible. Thus, Employer has failed to submit any credible evidence regarding the business necessity of the computer skills required.[3]

The same is true when the additional requirement "Requires knowledge of security products" is considered. The Employer has failed to submit any credible evidence, other than its own recollection, that any of the other eight systems analysts hired had prior "knowledge of security products."

Employer has failed to carry its burden of proof in showing that the challenged computer skills and knowledge of security products are either normally required for the job in the United States or arise from business necessity. Thus, Employer has failed to demonstrate its entitlement to alien labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five

[3] As noted by the CO in the Final Determination, the other "immigration advertisements" submitted by Employer are not relevant to this case. Even if, *arguendo*, the disposition of these other applications was relevant to this case, no evidence in the record shows that they were approved.

double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.